



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Action Alarm Systems of Alabama, Inc.

File: B-224877; B-224878

Date: October 16, 1986

DIGEST

Letter from bank, attached to bid, stating that the bank and the protester were in the process of negotiating the issuance of a letter of credit on behalf of the protester was not an irrevocable letter of credit and was not an adequate bid guarantee. This deficiency, which made the bid nonresponsive, could not be cured by the protester's subsequent tender of an acceptable cashier's check after bid opening.

DECISIONS

Action Alarm Systems of Alabama, Inc. (Action), protests the rejection of its bids as nonresponsive for failing to provide adequate bid guarantees as required by invitations for bids (IFBs) Nos. N62467-86-B-6667 and N62467-85-B-6721, issued by the Naval Air Station, Pensacola, Florida, for a security camera system and an intrusion protection system, respectively.

We find no merit to the protests.

The IFBs contained the clause specified in the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.228-1 (1985). That clause requires bidders to submit bid guarantees in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or certain bonds or notes of the United States. The clause also cautions bidders that failure to furnish a bid guarantee in the proper form and amount, by the time set for bid opening, "may" be cause for rejection of a bid.

Bids were opened on August 26, 1986, and the Navy found that accompanying Action's bids under both solicitations was a letter from a local bank, dated August 13, 1986, which read in pertinent part:

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"Please be advised that this Bank and [Action] are negotiating the Bank rendering its Irrevocable Letter of Credit to satisfy the performance and payment bond requirement Subject to the conditions and mutual considerations discussed [with Action] . . . issuance can be finalized . . . within the time frame designated in the Solicitation."

The Navy rejected the bids on the basis that the bid guarantees were inadequate since the letter was not an irrevocable letter of credit and did not satisfy the solicitations' requirement for a firm commitment. Further, the Navy would not accept a cashier's check that Action tendered after bid opening to cure the inadequacy in its bid guarantees. Action then filed this protest.

Action contends that it is a financially responsible firm and should receive both contract awards. Action states that the Navy is selectively enforcing the bid guarantee requirements by rejecting Action's bids while, at the same time, permitting below-cost bidders to withdraw their bids "without penalty" under the mistake in bids procedures. Action further suggests that since the bid guarantee provision in the solicitations uses the word "may" in relation to bid rejection, the agency in its discretion should have waived the deficiency in Action's bids.

A bid guarantee is a form of security assuring that a bidder will not withdraw its bid within the time specified for acceptance and will execute such contractual documents and furnish such bonds as may be required. FAR, 48 C.F.R. § 28.001. When a bid guarantee is required as part of a bid, the failure to provide a guarantee will render the bid nonresponsive. Zemark International Construction Co., B-203020, May 12, 1981, 81-1 CPD ¶ 372.

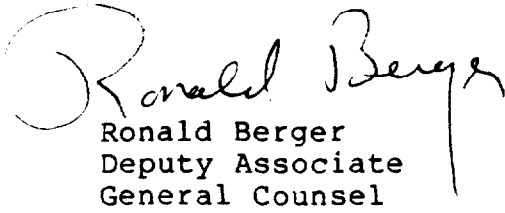
An irrevocable letter of credit in effect substitutes the bank's credit for that of the bidder at whose request the letter is issued. Chemical Technology, Inc., B-192893, Dec. 27, 1978, 78-2 CPD ¶ 438. An irrevocable letter of credit satisfies the requirement of a firm commitment because it assures the government of access to funds should a successful bidder fail or refuse to execute required contractual documents or to provide necessary bonds.

In the present case, we find that the Navy properly concluded that the letter submitted with the protester's bids was not adequate under the terms of the solicitations. The protester did not submit an irrevocable letter of credit with its bids, but submitted only a letter advising that such a letter of credit might be finalized in the future. Thus, by its terms, the bank's letter contemplated delivery at some future time of what the IFBs specifically required to be submitted contemporaneously with the bids. Accordingly, we find that the Navy was correct in finding that the letter tendered with the protester's bids fell short of the requirement for a firm commitment and that Action's bids were therefore nonresponsive. Further, since a bid which is nonresponsive due to the lack of an adequate bid guarantee cannot be made responsive through the furnishing of an acceptable guarantee after bid opening, Building Systems Contractors, Inc., B-219416, July 9, 1985, 85-2 CPD ¶ 36, the contracting officer also properly refused Action's tender of a cashier's check after bid opening.

Additionally, we point out that the agency did not have the discretion to waive the deficiency in Action's bid guarantee despite the solicitations' use of the word "may" in relation to bid rejection. In general, contracting agencies do not have the discretion to waive deficiencies in bid guarantees. Building Systems Contractors, Inc., B-219416, *supra*; A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. Permitting such waivers would compromise the integrity of the competitive bid system by allowing bidders to decide after bid opening, when competitors' prices have been exposed, whether they want their bids to be responsive. Colorado Elevator Service, Inc., B-206950.2, May 6, 1982, 82-1 CPD ¶ 434. Rather, noncompliance with the bid guarantee requirement can only be waived under those limited conditions specified in the FAR, 48 C.F.R. § 28.101-4, none of which is present here.

Finally, we fail to see how the Navy is engaging in selective enforcement of bid guarantees because it permits bidders to withdraw below-cost bids under the mistake in bid procedures. Under those procedures, a bidder is not permitted to withdraw its bid at will; rather, the bidder must present evidence of a bona fide mistake in its old price before an agency may permit the withdrawal of the bid. See Duro Paper bag Mfg. Co.--Request for Reconsideration, B-221377.2, Feb. 14, 1986, 86-1 CPD ¶ 165; FAR, 48 C.F.R. § 14-406-3. The mistake in bid procedures simply are not applicable to situations such as this one, where the bid is nonresponsive--such bids cannot be corrected. See FAR, 48 C.F.R. §§ 14.404-2, 14.406.

Accordingly, the protests are dismissed. 4 C.F.R. § 21.3(f)
(1986).


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